Petition

81-1734

NO.

Office-Supreme Court, U.S.
FILED
MAR 18 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM S. MONTAG,

Petitioner,

vs.

OUTBOARD MARINE CORPORATION, a Delaware corporation and OMC DISTRIBUTORS-TROY HILLS INC., a New Jersey corporation,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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I. Questions Presented

1. Does res judicata/collateral estoppel bar a claim for monetary damages when the claim for damages had not ripened when the prior actions were terminated?

2. Does res judicata/collateral estoppel bar a claim for monetary damages under a state statute which embodies a strong legislative policy of the State, when the prior federal antitrust actions did not implicate the state statute?

3. Does res judicata/collateral estoppel bar a claim for monetary damages under state law when the claimant justifiably believed that his state law claim had been contractually preserved in the settlement of the prior federal antitrust actions?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit filed in the above noted case on December 28, 1981.

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* In the Petition for Removal by defendants' counsel for defendants asserted: "Defendant 'OMC Distributors-Troy Hills, Inc.' at the time of the commencement of this action and since that time is non-existent." This assertion was not contested below. Thus, the sole respondent before this Court is Outboard Marine Corporation.

II. Citations to the Opinions Below

The Order for Summary Judgment entered by U.S. District Court Judge H. Curtis Meanor on May 15, 1981 is unreported (Appendix C). The Order does not set forth the Court's rationale. However, the Court's Oral Opinion, rendered on May 11, 1981 is appended hereto (Appendix B).

The Judgment Order of the United States Court of Appeals for the Third Circuit is also unreported (Appendix A).

III. Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

IV. Statutory Provisions Involved

The statute involved in this matter is the New Jersey Franchise Practices Act, N.J. Stat. Ann. 56:10-1 et seq. All relevant provisions of the New Jersey Franchise Practices Act are set forth in Appendix D, *post.*

V. Statement of the Case

This action was brought, pursuant to the New Jersey Franchise Practices Act (hereafter "Franchise Practices Act"), N.J. Stat. Ann. 56:10-1 et seq. (Appendix D), on behalf of the petitioner, William S. Montag (hereafter "Montag"), the assignee of Eastern Outboard Parts Cor-

poration. The Complaint was filed on September 26, 1980 in the Superior Court of New Jersey. The Complaint alleged violations of the Franchise Practices Act. Particularly, it was alleged that the September 30, 1978 termination of the franchise agreement between Eastern Outboard Parts Corporation (hereafter "Eastern") and respondent, Outboard Marine Corporation (hereafter "OMC") was without "good cause," as this term is defined in the Franchise Practices Act. Accordingly, damages were sought. In 1978, just prior to the termination of the franchise agreement, Eastern's annual sales of OMC products were approximately $9,000,000. As a consequence of OMC's termination, Eastern was forced out of business and Montag, the former President of Eastern, is presently unemployed.

OMC removed this matter to the United States District Court for the District of New Jersey. Thereafter, Montag unsuccessfully moved for a remand to the Superior Court of New Jersey. OMC unsuccessfully moved for a transfer of the matter to the United States District Court for the Northern District of Indiana, Fort Wayne Division.

Thereafter, OMC moved for the entry of Summary Judgment and for the dismissal of Montag's Complaint with prejudice. OMC contended that the instant action was barred, by reason of the doctrines of res judicata and collateral estoppel, by two prior federal antitrust actions to which both OMC and Eastern had been parties.

The Motion for Summary Judgment was argued before the Honorable H. Curtis Meanor, U.S.D.J., on May 11, 1981. An excerpt from the Transcript of Proceedings, wherein the Court's oral opinion appears, is Appendix B, *post*. The Court reviewed the two prior federal antitrust actions, and the settlement agreements relating there-

to. Judge Meanor ruled that Montag's instant cause of action is barred by res judicata, as applied to the consent judgment entered in the first federal antitrust action (Appendix B at 6a). Furthermore, although the Court did not deem it essential, Judge Meanor opined that the second federal antitrust action also barred Montag's instant action by operation of res judicata (Appendix B at 7a). By Order entered on May 15, 1981 (Appendix C), Judge Meanor granted OMC's Motion for Summary Judgment and dismissed Montag's Complaint with prejudice. Additionally, the Court expressly determined that there was no just reason for delay of the entry of Judgment.*

Thereafter, Montag appealed to the United States Court of Appeals for the Third Circuit, pursuant to 28 U.S.C. §1291. The appeal was argued on December 16, 1981 and, by a Judgment Order of December 28, 1981 (Appendix A), the judgment of the District Court was affirmed. As noted *ante*, the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Montag's assignor, and former employer, Eastern, was formed in 1955 for the express purpose of distributing OMC products: outboard motors and related accessories. Eastern and OMC entered into a series of written franchise agreements relating to Eastern's sale of OMC products in the State of New Jersey. The franchise arrangement was profitable for both Eastern and OMC. Indeed, just prior to the termination of Eastern's franchise in 1978, Eastern's annual sales of OMC products approximated $9,000,000. As a consequence of the September 30,

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* Judge Meanor was required to make this express determination, pursuant to Fed.R.Civ.P. 54(b) because OMC had filed a Counterclaim against Montag. Subject matter jurisdiction of this matter was conferred by 28 U.S.C. §1332.

1978 termination of the franchise agreement, Eastern is no longer operating and Montag is no longer employed.

In May 1971, OMC sent a letter to Eastern, which indicated that Eastern's distributorship agreement would be terminated, effective March 1, 1973. OMC sought to terminate its franchise arrangement with Eastern because OMC intended to establish a series of OMC subsidiaries for the purpose of distributing OMC products. In fact, OMC announced an intention to terminate all of its distributorship agreements. This announcement led to the institution of two federal antitrust actions. Because the instant Petition implicates the res judicata/collateral estoppel effect of the two prior antitrust actions, the two prior actions warrant extended discussion.

On September 21, 1971 a Complaint was filed in the United States District Court for the Northern District of Indiana, Fort Wayne Division, entitled *Covert Marine, Inc., et al.* v. *Outboard Marine Corp., et al.*, (hereafter *"Covert I"*). The plaintiffs in *Covert I* were six distributors of OMC products, located in Missouri, Massachusetts, Georgia, Louisiana and, in the case of Eastern, New Jersey. *Covert I* was *solely* a federal antitrust action, pursuant to the Clayton Act, 15 U.S.C. §§15, 25 and 26, to recover damages for, and to prevent and restrain, violations of the Sherman Act, 15 U.S.C. §§1 and 2. The Complaint alleged that OMC was guilty of fixing prices, imposing illegal tying arrangements and additional violations of the federal antitrust laws.

On May 23, 1972, without any testimony having been taken, and without trial or adjudication of any issue of fact or law, the parties consented to the entry of a Final Judgment in *Covert I*. The Final Judgment provided, in part:

> VIII. Except as expressly provided herein, each and every claim *asserted in the Complaint* is hereby dismissed with prejudice (emphasis added).

The Complaint in *Covert I* did not allege any cause of action under the New Jersey Franchise Practices Act. Indeed, the Franchise Practices Act was not effective until December 21, 1971, three months after the *Covert I* Complaint was filed. Under the terms of the Final Judgment, Eastern's distributorship agreement was extended, ultimately until September 30, 1978.

In November 1976, OMC announced its intention to terminate Eastern's distributorship agreement, as of September 30, 1978. The termination was without "good cause," as defined by the Franchise Practices Act.*

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* The Honorable H. Curtis Meanor focused on the fact that the extension of Eastern's franchise until September 30, 1978 was pursuant to the consent Final Judgment in *Covert I* (Exhibit B at 6a). To explain the viability of Montag's present Franchise Practices Act claim, in light of his assignor's agreement to terminate Eastern's franchise on September 30, 1978, a brief digression is necessary. Although the merits of Montag's claims were not addressed below, an understanding of the Franchise Practices Act is useful in resolving the issues presented in the instant Petition. Particularly, it is a violation of the Franchise Practices Act to terminate a franchise arrangement without "good cause," which is defined as "failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise." N.J. Stat. Ann. 56:10-5 (Appendix D at 12a). To the extent that the consent Final Judgment in *Covert I* embodied an agreement by Eastern that Eastern's franchise would be terminated at a specified future date, it is Montag's contention that such a provision is violative of the Franchise Practices Act. The statute expressly prohibits a franchisor from requiring "a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation,

(Footnote continued on following page)

On February 3, 1977, Eastern and 26 other distributors and dealers filed a Complaint in the United States District Court for the Western District of Missouri, Western Division, entitled *Covert Marine, Inc., et al.* v. *Outboard Marine Corp.*, (hereafter *"Covert II"*). The *Covert II* Complaint was brought under the same federal antitrust statutes as were implicated in *Covert I*. The *Covert II* action was brought, pursuant to Fed.R.Civ.P. 23, on behalf of the plaintiffs and a class of individuals and entities who were then purchasers for resale of replacement parts, and who were located in the Eastern United States. Again, *Covert II* implicated *only* federal antitrust statutes.

On June 13, 1978, *Covert II* was transferred to the Northern District of Indiana, Fort Wayne Division, the *Covert I* forum. On September 25, 1978, class certification was denied and, on July 30, 1979, the *Covert II* Court issued a Memorandum of Decision and Order, granting OMC's Motion for Dismissal as to the plaintiff-distributors, including Eastern. This Order was not, however, appealable as a matter of right because the Complaint by the 21 plaintiff-dealers, and OMC's Counterclaims, had not been adjudicated. Prior to trial of the remaining claims, an agreement was reached on February 12, 1980, whereby the claims of the plaintiff-dealers would be dismissed in return for the dismissal of the Counterclaims filed by OMC. The purpose of this arrangement was to allow an

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(Footnote continued from preceding page)

waiver or estoppel which would relieve any person from liability imposed by this act." N.J. Stat. Ann. 56:10-7a (Appendix D at 13a). Thus, to the extent that the *Covert I* Final Judgment incorporated Eastern's agreement that its franchise could be terminated, without a showing of "good cause," at a date in the future, and that OMC would be relieved of liability for such a termination, this provision is void.

immediate appeal from the July 30, 1979 Order which dismissed the Complaint of the plaintiff-distributors on the ground that the antitrust claims asserted in *Covert I* specifically barred the antitrust claims of *Covert II*. On February 22, 1980, a Notice of Appeal was filed on behalf of the plaintiff-distributors, including Eastern, from the Final Judgment entered on February 12, 1980 in *Covert II*.

On April 15, 1980, a settlement conference was held between counsel for OMC and counsel for the plaintiff-distributors. OMC offered to settle the claims of the six plaintiff-distributors, including Eastern, for a total payment of $108,000, in return for a dismissal of the pending appeal.

Counsel for the plaintiff-distributors obtained the authority of each plaintiff-distributor, *with the exception of Eastern,* to settle the dispute and to execute the general release requested by OMC. Eastern, through Montag, cognizant of its Franchise Practices Act rights, indicated a willingness to sign a partial release, *while specifically preserving any claim it may have had under state law, including the New Jersey Franchise Practices Act.* Counsel for the plaintiff-distributors forwarded five general releases and Eastern's partial release (which specifically preserved Franchise Practices Act claims) to counsel for OMC. Plaintiffs' counsel was thereafter advised that OMC would not accept Eastern's partial release, but that OMC was nonetheless willing to pay the proposed settlement sum, less the proportionate share which Eastern was to receive, in consideration for the releases from the five settling plaintiff-distributors. On June 9, 1980, OMC's $90,000 check was forwarded to plaintiffs' counsel "in full settlement of any and all claims set forth in the releases to be executed by the *beneficiary plaintiffs.*" Eastern was not a beneficiary plaintiff, and received no consideration from OMC in the settlement of *Covert II*.

However, by Order dated July 1, 1980, and corrected on July 11, 1980, the Seventh Circuit Court of Appeals dismissed the appeal of the plaintiff-distributors *with prejudice.* A Supplemental Affidavit from counsel for the plaintiff-distributors asserts that the dismissal of Eastern's appeal was with the full authority and approval of Montag, Eastern's president.*

On September 26, 1980, the instant action was commenced by a Complaint filed in the Superior Court of New Jersey on behalf of Montag, as assignee of Eastern. The instant Complaint alleged violations of the Franchise Practices Act, and did not implicate the federal antitrust statutes which were at issue in *Covert I* and *Covert II.*

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* The dismissal of Eastern's appeal, with prejudice, is a perplexing procedural anomaly. The status of the Seventh Circuit court record has led OMC to contend that *Covert II* was never settled as between OMC and Eastern, a contention with which the Honorable H. Curtis Meanor agreed (Exhibit B at 5a). Montag draws another inference. Particularly, Montag justifiably believed that his efforts to preserve Eastern's Franchise Practices Act claims were successful. Otherwise, Eastern would not have foregone its $18,000 share of the settlement of *Covert II.* This, in turn, leads to Montag's contention that res judicata/collateral estoppel should not bar the instant claim because he justifiably believed that Eastern's Franchise Practices Act claims had been contractually preserved.

VI. Reasons for Granting Writ

1. The Court of Appeals decision conflicts with this Court's decision in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1954).

The Honorable H. Curtis Meanor ruled that the instant action is barred, by reason of the doctrine of res judicata, relying upon the termination of *Covert I*. The Third Circuit affirmed the trial Court. Montag respectfully submits that Certiorari should be granted because the Third Circuit decision conflicts with this Court's decision in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955).

In *Lawlor, supra,* the plaintiffs instituted an antitrust action in 1942 against National Screen and three additional defendants, alleging that the defendants had conspired to establish a monopoly in the distribution of certain accessories. In 1943 the first action was settled on the basis that National Screen agreed to furnish the plaintiffs with the necessary accessories. The first action was dismissed with prejudice. Thereafter, in 1949, the same plaintiffs brought another antitrust action against the original four defendants, and five additional defendants. The second complaint alleged that the settlement of the first action was merely a device to perpetuate the conspiracy, that the five additional defendants had joined the conspiracy since 1943 and that National Screen had been involved in further restraints of trade. The second action was dismissed by the District Court and the Third Circuit. The Supreme Court, Chief Justice Warren, reversed, concluding that the two actions were not based upon the same cause of action. 349 U.S. at 327. The Supreme Court was not persuaded by the fact that both actions involved the same course of wrongful conduct. *Id.* This Court held:

> While the 1943 judgment precludes recovery on claims arising prior to its entry, *it cannot be given the effect of extinguishing claims which did not even then exist* and which could not possibly have been sued upon in the previous case. * * *
>
> This conclusion is unaffected by the circumstance that the 1942 complaint sought, in addition to treble damages, injunctive relief which, if granted, would have prevented the illegal acts now complained of. * * *

349 U.S. at 328-329 (emphasis added; footnote omitted).

In the case *sub judice,* Montag seeks monetary damages for the termination of Eastern's franchise on September 30, 1978. The termination, which gave rise to Montag's claim for monetary damages, occurred subsequent to the filing of the Complaints in *Covert I* and *Covert II.* It is of no moment that Eastern could arguably have sought injunctive relief in *Covert II,* pursuant to N.J. Stat. Ann. 56:10-10,* which, if granted, would have prevented the illegal termination now complained of. The simple reality is that Eastern's claim for monetary damages did not ripen until September 30, 1978 when the franchise was terminated. Thus, neither *Covert I* nor *Covert II* could have extinguished a claim for damages which had not ripened.

In the proceedings before the Honorable H. Curtis Meanor, OMC suggested that Eastern had ample opportunity to amend the Complaint in *Covert I* to include East-

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* Eastern's right to have sought injunctive relief is described as "arguable," because N.J. Stat. Ann. 56:10-10 provides that the franchisee may seek injunctive relief in the Superior Court of the State of New Jersey. An attempt to seek such injunctive relief in the Western District of Missouri (or Northern District of Indiana) may well have been subject to dismissal.

ern's Franchise Practices Act claims. In making this contention, OMC misconstrued the applicability of the Franchise Practices Act. The effective date of the statute was December 21, 1971. However, the statute did not apply to a pre-existing franchise until the pre-existing franchise was renewed or amended after the effective date. N.J. Stat. Ann. 56:10-8. Eastern's agreement with OMC had been renewed on August 2, 1971, prior to the effective date of the statute. The term of the renewal agreement was until February 28, 1973. Thus, the franchise agreement did not come within the protection of the Franchise Practices Act until February 28, 1973. Inasmuch as the Final Judgment in *Covert I* was filed on May 23, 1972, Eastern could not have amended the Complaint in *Covert I* to include the Franchise Practices Act claims.

Montag concedes that the Franchise Practices Act was applicable to Eastern and OMC when the *Covert II* Complaint was filed on February 3, 1977. However, as discussed *ante,* Eastern's claim for monetary damages did not arise until September 30, 1978. To suggest that an amendment of the *Covert II* Complaint was possible at this time, 19 months after the Complaint had been filed, is unrealistic.

2. This case raises important questions of federal law which have not been, but should be, resolved by this Court.

A. Is there an exception to the bar of res judicata/ collateral estoppel when a state statute embodies a strong legislative policy of the state?

This Court has recently held that the doctrine of res judicata is not subject to a "general equitable" exception or a "public policy" exception. *Federated Dept. Stores, Inc.* v. *Moitie,* —— U.S. ——, 101 S.Ct. 2424, 69 L. Ed.2d

103, 110 (1981). Indeed, although it was unnecessary to the resolution of the issues presented in *Federated Dept. Stores, Inc., supra*, Justice Rehnquist opined: "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'" 69 L. Ed.2d at 110, *quoting from Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

Justices Blackmun and Marshall agreed with the result in *Federated Dept. Stores, Inc., supra*, but suggested that they

> would not close the door upon the possibility that there are cases in which the doctrine of res judicata must give way to what the Court of Appeals [in *Federated Dept. Stores*] referred to as "overriding concerns of public policy and simple justice."

69 L. Ed.2d at 111 (Blackmun, J., concurring). Montag respectfully submits that the case *sub judice* is just such a case.

The Franchise Practices Act, N.J. Stat. Ann. 56:10-2, expressly provides:

> The Legislature finds and declares that *distribution and sales through franchise arrangements in the State of New Jersey vitally affects the general economy of the state, the public interest and the public welfare.* It is therefore necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in connection with the franchise arrangements [Appendix D at 10a; emphasis added].

In *Westfield Centre Serv., Inc.* v. *Cities Serv. Oil Co.*, 162 N.J.Super. 114, 392 A.2d 243 (Ch. Div. 1978), aff'd, and remanded on other grounds, 172 N.J.Super. 196, 411 A.2d 714 (App. Div. 1980), aff'd and remanded, 86 N.J. 453, 432 A.2d 48 (1981), the trial Court, in considering

the provision for the award of attorney's fees to a successful franchisee under N.J. Stat. Ann. 56:10-10 observed:

> *There is, as noted, a strong public policy in this State, as expressed by the Franchise Practices Act, against the unjustified termination of franchises. In suing under the act the franchisee vindicates not only its own rights, but the public policy of this State as well.* It is therefore entirely appropriate that the franchisor found to have violated this public policy be assessed the costs incurred by the franchisee as the result of such violation.

162 N.J.Super. at 121 (emphasis added).

The national labor policy has been recognized as limiting the doctrine of res judicata. *Denver Bldg. and Const. Tr. C.* v. *National Labor Rel. B.*, 186 F.2d 326 (C.A.D.C. 1950), rev'd on other grounds, 341 U.S. 675 (1951).

The doctrine of res judicata has likewise been limited in the area of civil rights. Suits under Title VII, 42 U.S.C. §2000e, are not barred by prior state proceedings. *Gunther* v. *Iowa State Men's Reform.*, 612 F.2d 1079 (8th Cir. 1980), cert. den., 446 U.S. 966 (1980). The doctrine of res judicata has been limited in 42 U.S.C. §1983 actions asserting federal constitutional issues, where those issues could have been, but in fact were not, litigated in an earlier state court proceeding. *Lombard* v. *Board of Education of City of New York*, 502 F.2d 631 (2d Cir. 1974), cert. den., 420 U.S. 976 (1975). In *New Jersey Ed. Ass'n.* v. *Burke*, 579 F.2d 764 (3d Cir. 1978), cert. den., 439 U.S. 894 (1978), the Third Circuit stated:

> To hold that state court litigation bars a federal forum from deciding any claims which might have been raised before the state court, would turn the

> state court into quicksand. It would only serve as a trap for unwary plaintiffs who desire a federal tribunal, but encourage competently represented litigants to forego any venture into state jurisdiction to exhaust state administrative and judicial procedures on pain of losing their right to a federal hearing. Such results are hardly salutary.

579 F.2d at 774.

Additionally, the doctrine of res judicata has been limited in the area of bankruptcy. *Kalb* v. *Feuerstein,* 308 U.S. 433 (1940).

Thus, it is clear that the bar of res judicata/collateral estoppel can be lifted when these doctrines are confronted with a strong public policy to the contrary, especially where, as here, the strong public policy is embodied in a statutory scheme which governs economic relations (such as the strong legislative mandate embodied in the Franchise Practices Act).

B. Is there an exception to the bar of res judicata/collateral estoppel when the claimant justifiably believed that his state law claim had been contractually preserved?

The res judicata/collateral estoppel effect of a judgment can be contractually stipulated between the parties. See, generally, 1B *Moore's Federal Practice* ¶.405[1], p. 629 (2d Ed. 1974).

With respect to *Covert I,* the consent Final Judgment expressly provided that the dismissal was limited to "each and every claim asserted in the Complaint." The *Covert I* Complaint addressed only federal antitrust allegations. Additionally, as discussed *ante,* Eastern's Franchise Prac-

tices Act claims could not have been raised in *Covert I* because the agreement between Eastern and OMC was not subject to the Franchise Practices Act until February 28, 1973. Thus, it is clear that Eastern's (now Montag's) Franchise Practices Act claims could not have been raised in *Covert I* and, therefore, could not be barred by the res judicata/collateral estoppel effect of *Covert I*. Moreover, assuming, *arguendo*, that such claims could have been raised, the parties contractually stipulated in the *Covert I* Final Judgment that such claims were preserved.

Turning to *Covert II*, it is clear that Montag was cognizant of Eastern's Franchise Practices Act claims, and that Montag believed that he was preserving such claims. Inasmuch as Montag executed only a partial release, received no monies from the settlement, and was not a *beneficiary plaintiff*, it is respectfully submitted that Montag justifiably believed that Eastern's Franchise Practices Act claims had been preserved. Had Montag not believed that Eastern's claims had been preserved, Eastern would not have foregone its $18,000 share of the settlement.* In *Riordan* v. *Ferguson*, 147 F.2d 983 (2d Cir. 1945), the first action resulted in a judgment dismissing the Complaint. An appeal was taken and, by stipulation, the appeal was dismissed. *Id.* at 986. The dismissal was the result of a settlement agreement entered into by the parties while the appeal was pending. The Court held that the effect of the settlement agreement pending appeal was to annul the judgment of the trial court. *Id.* at 987. The Court held

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* In this regard, to the extent that this Court is of the opinion that *Covert II* was settled as between Eastern and OMC, it is Montag's position that the settlement was not authorized by Eastern and, accordingly, should not be accorded res judicata/collateral estoppel effect. *United States* v. *Beebe*, 180 U.S. 343 (1901); *West* v. *Bank of Commerce & Trusts*, 167 F.2d 664 (4th Cir. 1948).

that the prior judgment had no res judicata effect in the subsequent action. *Id.*

In the context of the instant Petition, *Riordan, supra,* supports the proposition that *Covert II* should be denied res judicata/collateral estoppel effect. The settlement of *Covert II* pending appeal, and the dismissal of the appeal, rendered the judgment of the trial court a nullity. Thus, one must examine the agreement between the parties to ascertain the res judicata/collateral estoppel effect of *Covert II*. As noted above, general releases were given by all of the beneficiary plaintiffs, and each of the beneficiary plaintiffs received $18,000. However, Eastern gave no release and received no money. Thus, *Covert II* has no res judicata/collateral estoppel effect as to Eastern or Eastern's assignee, the present Petitioner, Montag.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

DENNIS J. DRASCO
Counsel for Petitioner, William S. Montag

Dated: March 17, 1982

[APPENDICES FOLLOW]

Appendix

APPENDIX A

Judgment Order of the United States Court of Appeals for the Third Circuit, dated December 28, 1981

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-2110

WILLIAM S. MONTAG,

Appellant,

v.

OUTBOARD MARINE CORPORATION, a Delaware Corporation and OMC DISTRIBUTORS-TROY HILLS INC., a New Jersey Corporation.

Appeal from the United States District Court
for the District of New Jersey

C. A. No. 80-3344

Argued December 16, 1981

Before: ADAMS, GIBBONS and GARTH, *Circuit Judges.*

Appendix A

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs to be borne by appellant.

By the Court,

/s/ Arlin M. Adams

Circuit Judge

ATTEST:

Sally Mrvos, Clerk

Dated: December 28, 1981

APPENDIX B

Oral Opinion by the United States District Court for the District of New Jersey, rendered on May 11, 1981

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil No. 80-3344

WILLIAM S. MONTAG,

Plaintiff, TRANSCRIPT OF PROCEEDINGS MOTION

v.

OUTBOARD MARINE CORP.,

Defendant.

Newark, New Jersey
May 11, 1981

Before:

THE HONORABLE H. CURTIS MEANOR, U.S.D.J.

Appearances:

LUM, BIUNNO & TOMPKINS, ESQS.
By: DENNIS J. DRASCO, ESQ.
Attorneys for the Plaintiff

HEIN, SMITH & BEREZIN, ESQS.
By: LAWRENCE D. SMITH, ESQ.

and

DICKIE, MCCAMEY & CHILCOTE, ESQS.
By: M. RICHARD DUNLAP, ESQ (Penna. Bar)
Attorneys for the Defendant

• • •

Appendix B

[The Court]

Gentlemen, I think this case is barred by res judicata. I thought so from the first time I saw it, after reading these rather excellent briefs I'm still convinced it is.

The short history of it is that Plaintiff Montag is an assignee of the franchisee of outboard boat accessories, motors, et cetera.

Litigation was instituted in Federal Court in Indiana some time in 1971, I believe, which was settled.

The crucial term of settlement for me is that as a consequence of the settlement the Federal Court in Indiana ordered that the franchise be extended—if you want to put it that way—that the relational interests be continued but be terminated September 30, 1978. That was a Consent Judgment which in my judgment had exactly the same res judicata effect as a judgment after trial on the merits.

I know of no real basis of distinguishing between them.

The New Jersey Franchise Practices Act came into being in December of 1971.

Plaintiff is quite correct on the Marinello-Shell Oil case that the New Jersey Supreme Court in effect applied that Act to pre-existing franchises even though the Act by its terms applies only to franchises entered into or renewed after its effective date.

In the mid Seventies there was a Covert 2 litigation.

The Covert 2 litigation was held to be barred by Covert 1.

There was settlement pending appeal. Eastern, Montag's predecessor, tried in its settlement to reserve any rights it would have under State law, including the New Jersey Franchise Practices Act.

Appendix B

As a consequence, the settlement was not consummated between Eastern and Outboard Marine of the Covert 2 litigation.

The District Court had already dismissed the Complaint in Covert 2 with prejudice, as I understand it, and the appeal was dismissed with prejudice as to Eastern.

I think there are two bases for the application of the bar of res judicata and/or collateral estoppel here.

The case I found closest in point is *Martino* v. *McDonald Systems,* which is [a] 7th Circuit case, 598 F.2d 1079.

The facts are rather similar. First what this suit amounts to, broad as it is under the New Jersey Franchise Practices Act, is an attack upon the judgment in Covert 1.

Covert 1 was a decree by consent, though it was in settlement of an antitrust litigation that the franchise, the relational interest between Montag's predecessor, Eastern, and these defendants, would exist until September 30, 1978, and would thereafter be terminated.

The argument is made that this judgment which was entered in May of 1972 after the New Jersey FPA and [sic] been effective, was in effect an extension of the franchise that brings the extension of the franchise pursuant to judgment within the New Jersey Act.

If that is so, then the finality and the effect of a Federal District Court judgment in Indiana in 1972 is going to be destroyed.

The parties, having made an agreement and formalized it by judicial decree, are bound by it.

Appendix B

The plaintiff's cause of action here is the alleged unlawful termination of his franchise as of September 30, 1978.

He may have many, many theories to recover damages and obtain other relief because of that cause of action. The cause of action is not the New Jersey Franchise Practices Act or the Sherman Acts or the Robinson-Patman Act, the cause of action is the unlawful termination of the franchise.

The decree of 1972 entered in Indiana legitimizes the termination as of September 30, 1978. It is a lawful termination according to that decree, which is entitled to, I think, complete res judicata effect.

I do not believe I need to go any further. I do not believe I need to reach the effect, if any, of Covert 2 on this case. However, it does seem to me that the matter of the New Jersey Franchise Practices Act could have been litigated in the Covert 2 case, if not upon diversity ground, an independent jurisdictional base upon pendant [sic] jurisdictional grounds.

A cause of action arising under the New Jersey Franchise Practices Act for unlawful termination of the franchise arises on the same facts that were alleged in Covert 2 as I understand it.

The plaintiff perhaps did not have a cause of action for money damages at that time under the New Jersey Franchise Practices Act, but he certainly was faced with a judicial decree to the effect that his franchise was going to end in September of 1978.

The NJFPA specifically provides for injunctive relief. The plaintiff could have litigated the New Jersey Fran-

chise Practices Act matter in the Covert 2 litigation, ad [sic] did not do so.

Furthermore, in Covert 2 there is a dismissal with prejudice still on the docket. Now, that may have been without authority of the attorney, it may have been through error, inadvertence, I know not.

I am quite clear if that dismissal is to be corrected that correction has to take place in the U.S. District Court in Indiana and not in the U.S. District Court in New Jersey. So as an alternative I would say the could have litigated part of res judicata principle would bar this case in any event under Covert 2, but I don't believe that's an essential part of the whole thing.

I think, quite clearly to me, the legality of the termination of the franchise as of September 30, 1978, is res judicata under the Covert 1 decree.

You may have your Motion for Summary Judgment granted. Present me with an Order promptly.

(Whereupon, the matter stands adjourned.)

APPENDIX C

Order for Summary Judgment by the United States District Court for the District of New Jersey, dated May 15, 1981

HEIN, SMITH & BEREZIN, ESQS.
2 University Plaza
Hackensack, New Jersey 07601
(201) 487-7400
Attorneys for Defendants
LDS/29650

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Plaintiff,	:	
WILLIAM S. MONTAG,	:	Case No. 80-334
v.	:	Hon. H. Curtis
Defendants,	:	Meanor
OUTBOARD MARINE CORPORATION, A Delaware corporation, and OMC DISTRIBUTORS-TROY HILLS, INC., a New Jersey corporation.		ORDER FOR SUMMARY JUDGMENT

THIS MATTER having been opened to the Court by Hein, Smith & Berezin, Esqs.; Lawrence D. Smith, Esq. appearing, and Dickie, McCamey & Chilcote, Esqs.; M. Rich-

Appendix C

ard Dunlap, Esq. appearing, Attorneys for defendants, on notice to Lum, Biunno & Tompkins, Esqs., Attorneys for plaintiff; Dennis Drasco, Esq. appearing, by way of application for Summary Judgment, and the Court having read and considered the papers filed by all counsel, and having heard argument, and good cause having been shown; it is, on this 15 day of May, 1981;

ORDERED, that there is no genuine issue as to any material fact and that defendant, Outboard Marine Corporation is entitled to Judgment as a matter of law, and therefore defendants' Motion for Summary Judgment is hereby granted. The Court also expressly determines that there is no just reason for delay of the entry of Judgment in this action, and it is expressly directed that Judgment be entered in favor of defendant, Outboard Marine Corporation and against plaintiff William S. Montag, and plaintiff's Complaint be and hereby is dismissed, with prejudice; and it is

FURTHER ORDERED, that a copy of this Order shall be served upon plaintiff's attorneys within seven (7) days of the date hereof, via regular mail.

/s/ H. CURTIS MEANOR
H. Curtis Meanor, U.S.D.J.

APPENDIX D

Excerpt from New Jersey Franchise Practices Act, N.J. Stat. Ann. 56:10-1 et seq.

56:10-1. SHORT TITLE

This act shall be known and may be cited as the "Franchise Practices Act."

56:10-2. LEGISLATIVE FINDINGS

The Legislature finds and declares that distribution and sales through franchise arrangements in the State of New Jersey vitally affects the general economy of the State, the public interest and the public welfare. It is therefore necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in connection with franchise arrangements.

56:10-3. DEFINITIONS

As used in this act:

a. "Franchise" means a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.

b. "Person" means a natural person, corporation, partnership, trust, or other entity and, in case of an entity, it shall include any other entity which has a majority interest in such entity or effectively controls such other entity as well as the individual officers, directors, and

other persons in active control of the activities of each such entity.

c. "Franchisor" means a person who grants a franchise to another person.

d. "Franchisee" means a person to whom a franchise is offered or granted.

e. "Sale, transfer or assignment" means any disposition of a franchise or any interest therein, with or without consideration, to include but not limited to bequest, inheritance, gift, exchange, lease or license.

f. "Place of business" means a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services. Place of business shall not mean an office, a warehouse, a place of storage, a residence or a vehicle.

56:10-4. FRANCHISES TO WHICH ACT APPLICABLE

This act applies only to a franchise (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey, (2) where gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to this act, and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise.

56:10-5. TERMINATION OF FRANCHISE; NOTICE; GROUNDS

It shall be a violation of this act for any franchisor directly or indirectly through any officer, agent, or em-

ployee to terminate, cancel, or fail to renew a franchise without having first given written notice setting forth all the reasons for such termination, cancellation, or intent not to renew to the franchisee at least 60 days in advance of such termination, cancellation, or failure to renew, except (1) where the alleged grounds are voluntary abandonment by the franchisee of the franchise relationship in which event the aforementioned written notice may be given 15 days in advance of such termination, cancellation, or failure to renew; and (2) where the alleged grounds are the conviction of the franchisee in a court of competent jurisdiction of an indictable offense directly related to the business conducted pursuant to the franchise in which event the aforemetioned termination, cancellation or failure to renew may be effective immediately upon the delivery and receipt of written notice of same at any time following the aforementioned conviction. It shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, cancelling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.

56:10-6. TRANSFER OF FRANCHISE; NOTICE; APPROVAL; AGREEMENT OF COMPLIANCE

It shall be a violation of this act for any franchisee to transfer, assign or sell a franchise or interest therein to another person unless the franchisee shall first notify the franchisor of such intention by written notice setting forth in the notice of intent the prospective transferee's name, address, statement of financial qualification and business

experience during the previous 5 years. The franchisor shall within 60 days after receipt of such notice either approve in writing to the franchisee such sale to proposed transferee or by written notice advise the franchisee of the unacceptability of the proposed transferee setting forth material reasons relating to the character, financial ability or business experience of the proposed transferee. If the franchisor does not reply within the specified 60 days, his approval is deemed granted. No such transfer, assignment or sale hereunder shall be valid unless the transferee agrees in writing to comply with all the requirements of the franchise then in effect.

56:10-7. Prohibited practices

It shall be a violation of this Act for any franchisor, directly or indirectly, through any officer, agent or employee, to engage in any of the following practices:

a. To require a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this act.

b. To prohibit directly or indirectly the right of free association among franchisees for any lawful purpose.

c. To require or prohibit any change in management of any franchisee unless such requirement or prohibition of change shall be for good cause, which cause shall be stated in writing by the franchisor.

d. To restrict the sale of any equity or debenture issue or the transfer of any securities of a franchise or in any way prevent or attempt to prevent the transfer, sale or issuance of shares of stock or debentures to employees,

personnel of the franchisee, or heir of the principal owner, as long as basic financial requirements of the franchisor are complied with, and provided any such sale, transfer or issuance does not have the effect of accomplishing a sale of the franchise.

e. To impose unreasonable standards of performance upon a franchisee.

f. To provide any term or condition in any lease or other agreement ancillary or collateral to a franchise, which term or condition directly or indirectly violates this act.

56:10-8. APPLICATION OF ACT TO PRIOR GRANTS OF FRANCHISES

This act shall not apply to a franchise granted prior to the effective date of this act, provided, however, that a renewal of a franchise or an amendment to an existing franchise shall not be excluded from the application of this act.

56:10-9. ACTION AGAINST FRANCHISOR; DEFENSES

It shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise and other agreements ancillary or collateral thereto.

56:10-10. ACTION AGAINST FRANCHISOR; DAMAGES; INJUNCTION; COSTS

Any franchisee may bring an action against its franchisor for violation of this act in the Superior Court of

the State of New Jersey to recover damages sustained by reason of any violation of this act and, where appropriate, shall be entitled to injunctive relief. Such franchisee, if successful, shall also be entitled to the costs of the action including but not limited to reasonable attorney's fees.

56:10-11. SEVERABILITY

If any provision of this law or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the law which can be given effect without the invalid provision or application, and to this end the provisions of this law are severable.

56:10-12. LIMITATION OF LIABILITY OF FRANCHISOR, ITS OFFICERS, AGENTS OR EMPLOYEES FOR FURNISHING INFORMATION

No liability on the part of and no cause of action of any nature other than as provided by this act shall arise against any franchisor, its officers, agents or employees furnishing information as to reasons for termination, cancellation, intent not to renew, failure to renew, unacceptability of a proposed transferee, or relating to the character, financial ability or business experience of a proposed transferee, or for statements made or evidence submitted at any hearing or trial conducted in connection therewith.

56:10-13. MOTOR VEHICLE FRANCHISOR; MOTOR VEHICLE FRANCHISEE; DEFINITIONS

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Opposition

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1734

IN THE

Supreme Court of the United States

October Term, 1981

WILLIAM S. MONTAG,

Petitioner,

vs.

OUTBOARD MARINE CORPORATION, a Delaware Corporation, and OMC DISTRIBUTORS-TROY HILLS, INC., a New Jersey Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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Statement of the Case

Respondent Outboard Marine Corporation ("OMC")[1] presents its own Statement of the Case to correct omissions in Petitioner's Statement of the case, and to clarify the history of the litigation between these parties. The history will be submitted chronologically, leading to the case *sub judice*.

[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, OMC has no parent company and has no affiliates. It has as subsidiaries (other than wholly owned subsidiaries) only Outboard Marine Australia, PTY Limited.

Prior to 1971, OMC distributed its products through a number of independent distributors located throughout the United States. In 1971, OMC determined that it would assume the wholesale distribution function itself, and notified its distributors of the planned change.

Petitioner's assignor,[2] Eastern Outboard Parts Corporation ("Eastern"), was one of these distributors. Eastern was advised of the new distribution plan on or about May 7, 1971, and was further advised that upon the expiration of the then-existing distributor agreement with OMC, OMC would refuse to execute a new agreement with a term beyond February 28, 1973.

After receipt of the May 7, 1971 letter, Eastern and OMC did enter into a new distributor agreement that specified that it would expire on February 28, 1973.

Subsequent to the renewal of the agreement, Eastern and five other distributors on September 1, 1971 brought an action against OMC in the United States District Court for the Northern District of Indiana, styled *Covert Marine, Inc., et al. v. Outboard Marine Corporation, et al.*, Civil Action No. 71-F-104. ("*Covert I*").

Covert I alleged that the proposed change in OMC's distribution practice violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. The complaint requested that OMC be enjoined from ceasing to deal with the distributors on February 28, 1973, as was planned.

Eight months after the filing of the *Covert I* complaint, OMC and the distributors agreed to a settlement of the case. In essence, the settlement provided that OMC would delay its assumption of the distribution function

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[2] Petitioner's complaint in this case alleged that Petitioner William S. Montag is the President of Eastern, and that he "is the assignee for good and valuable consideration from Eastern of the claims alleged herein". There is no present dispute about the assignment, and it is agreed that Petitioner and Eastern are in privity.

from February 28, 1973, until September 30, 1978, and the distributors agreed that they would at that time relinquish their distributorships.

The *Covert I* settlement agreement was reduced to a Final Judgment and submitted to the district judge, the Honorable Jesse E. Eschbach, for approval. It was signed and filed on May 23, 1972. A complete copy of the Final Judgment (except for its attachments) is included herewith as Appendix 1.

The Final Judgment recited the fact that the parties had consented to it, and that it was entered without trial or adjudication of any issue of fact or law. The substance of the agreement is found in paragraph III of the Final Judgment, which reads as follows:

III

> The term of the OMC Parts and Accessories Distributor Agreement between each plaintiff and defendant Outboard Marine Corporation, a copy of which is attached hereto, shall be extended to September 30, 1978, and any provision therein for earlier expiration or termination without cause is hereby cancelled, and each such Agreement shall thereupon terminate and be of no further force and effect and defendant Outboard Marine Corporation shall have no further obligation to deal with any plaintiff. During the term of each such Agreement the territory specified therein shall not be diminished.

The Final Judgment also dismissed the *Covert I* complaint with prejudice.

No appeal has ever been filed in *Covert I*, and there is no dispute that OMC abided by the terms of the *Covert I* Final Judgment. There also is agreement to the fact that

Eastern consented to the Final Judgment, and that the Final Judgment is valid.[3]

However, at the approach of the agreed-to termination date of September 30, 1978, a second action was filed, seeking to enjoin the termination and for damages, again alleging violations of the Sherman Act. In addition to the distributors (again including Eastern), plaintiffs included a number of OMC's retail dealers. The case was styled *Covert Marine, Inc., et al. v. Outboard Marine Corporation*, Civil Action No. 77-0082-CV-W-1, and was filed in the United States District Court for the Western District of Missouri, Western Division. The case was subsequently transferred to the United States District Court for the Northern District of Indiana, Fort Wayne Division, and assigned Civil No. F78-76. This case ("*Covert II*") was assigned to Judge Eschbach, the same judge who had handled *Covert I*.

Five days before the date of the termination of the distributorships as ordered in *Covert I*, the Court in *Covert II* issued its Memorandum of Decision and Order denying class certification and denying the request for preliminary injunction. This decision was affirmed on appeal. 601 F.2d 595 (7th Cir. 1979), *cert. denied*, 444 U.S. 865, 100 S.Ct. 136, 62 L.Ed.2d 88 (1979).

On July 30, 1979 the district court in *Covert II* issued another Memorandum of Decision and Order (Appendix 2), which granted OMC's Motion to Dismiss the case of Eastern and the other plaintiff-distributors based upon the *res judicata* effect of the Final Judgment in *Covert I*. The dealer-plaintiffs were later dismissed, at which time

[3] With one exception. Petitioner, in his footnote on pages 6-7 of Petition for a Writ of Certiorari, contends that the Final Judgment is "void" to the extent that it provides for the termination of Eastern's distributorship as of September 30, 1978. This point is discussed in the Argument portion of this Brief.

the judgment against Eastern and the other distributor-plaintiffs became final, and they then appealed their dismissal to the United States Court of Appeals for the Seventh Circuit. The record discloses this appeal was voluntarily dismissed, with prejudice. (Appendix 3 herein).

Petitioner contends that the dismissal of this appeal "is a perplexing procedural anomaly". (Footnote on page 9 of Petition For a Writ of Certiorari). Whatever Mr. Montag may have believed, however, the record is clear and unambiguous: *Covert II* was dismissed by the district court based upon the *res judicata* effect of *Covert I*, and the appeal was dismissed by the Seventh Circuit with prejudice. The record in this case filed in the District Court for the District of New Jersey includes an Affidavit by William M. Austin, who was the attorney representing Eastern in *Covert II*, in which he states "I dismissed Eastern's appeal with the full authority and approval of William S. Montag, Eastern's president". (Appendix 4 herein).

Less than three months after the Seventh Circuit dismissed *Covert II* with prejudice, William S. Montag, as the assignee of Eastern, brought this action in Bergen County, New Jersey, against OMC and "OMC Distributors-Troy Hills, Inc."[4] OMC removed the action to the United States District Court for the District of New Jersey, which ultimately granted OMC's Motion for Summary Judgment, and dismissed Petitioner's claim that the September 30, 1978 termination of Eastern's distributorship violated the New Jersey Franchise Prac-

[4] "OMC Distributors-Troy Hills, Inc." in fact is non-existent. What plaintiff perceived to be a separate New Jersey corporation is simply a division of OMC which is a Delaware corporation with its principal place of business in Waukegan, Illinois. Thus the only actual defendant is Respondent herein, OMC.

tices Act. The district court's Order and oral Opinion are Appendix B and Appendix C to the Petition for a Writ of Certiorari.

Petitioner appealed the dismissal of his claim to the United States Court of Appeals for the Third Circuit, which affirmed the district court's ruling. The Third Circuit's Judgment Order is Appendix A to the Petition for a Writ of Certiorari.

Summary of Argument

1. Petitioner's reliance on *Lawlor v. National Screen Service Corp.* is misplaced. *Lawlor* recognized the existence of a new and separate cause of action which accrued from illegal acts engaged in after the entry of a consented-to final judgment, and held the earlier final judgment could not bar a later action based upon the illegal acts engaged in subsequent to the entry of the final judgment.

The only act committed by OMC subsequent to the entry of the consented-to Final Judgment in *Covert I* is the termination of Petitioner's distributorship, which was agreed to by Petitioner and incorporated into the *Covert I* Final Judgment. A holding that the execution of the terms of a consented-to Final Judgment fails to create a new cause of action does not conflict with *Lawlor.*

2. There is no exception to the bar of *res judicata* in the federal courts created by "a strong legislative policy" of a state. Petitioner cites no case supporting his position, and the case of *Federated Department Stores, Inc. v. Moitie,* holds to the contrary.

Additionally, it would be contrary to the supremacy clause of the United States Constitution to permit a state policy to override and nullify a final judgment entered in a federal court in a case brought under a federal statute.

There is no unsettled question of federal law on this point; the law is quite clear, and it is contrary to Petitioner's position.

3. There is no exception to the bar of *res judicata* created by an erroneous belief of Petitioner. In this case, Petitioner's claim under all legal theories was extinguished by the Final Judgment entered in *Covert I*, and Petitioner's contention that his state action claims were preserved are belied by the terms of the Final Judgment itself.

While Petitioner no longer had a claim under the state statute when he was pursuing *Covert II*, if he in fact did have one, it could have been included in the *Covert II* complaint, and its dismissal with prejudice bars any subsequent attempt to assert a claim under the state statute.

If the appeal in *Covert II* was erroneously dismissed with prejudice, that error must be corrected at the Seventh Circuit or the district court in Indiana. The dismissal with prejudice entered by the Seventh Circuit cannot be collaterally attacked in the United States District Court for the District of New Jersey, or in the New Jersey state courts.

There is no unsettled question of federal law on this point. Again, the law is quite clear, and it is contrary to Petitioner's position.

ARGUMENT

1. The Court of Appeals decision does not conflict with *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1954).

Petitioner argues that the decisions of the District Court and the Court of Appeals conflict with *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1954). Such is not the case.

Lawlor held that a 1943 judgment could not bar plaintiff's action against defendant for *new* antitrust violations that occurred *after* the 1943 judgment: "while the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." 349 U.S. at 328, 75 S.Ct. at 868, 99 L.Ed. at 1127-28.

This statement of the law in *Lawlor* is unquestionably correct, and Respondent embraces it as dispositive of this case.

Petitioner does not dispute the fact that two cases, one brought under the Sherman Act and one brought under a state statute, are but a single cause of action if they arise out of the same course of conduct. Petitioner argues, however, that a new event took place after the *Covert I* Final Judgment which created a new and separate cause of action which would not be barred by the Final Judgment in *Covert I*. Petitioner cites *Lawlor* to support its contention that this new and separate cause of action cannot be barred by the earlier judgment.

A close look at Petitioner's argument, however, reveals that the only "new" event alleged to have taken place after the *Covert I* Final Judgment is the actual termina-

tion of Eastern's distributorship on September 30, 1978, *as agreed to by Eastern and as ordered in the Covert I Final Judgment*!

Petitioner can point to no case nor present any logical reason to support its contention that a new and separate cause of action arises when the parties to a consented-to Final Judgment do exactly as they agreed and were Ordered to do at a date specified in the Final Judgment; certainly *Lawlor* does not stand for that proposition.

Covert II adds little to the controversy. Although the September 30, 1978 termination occurred during the pendency of *Covert II*, it was itself ultimately dismissed based upon the *res judicata* effect of *Covert I*. However, if Petitioner was correct that the actual termination of Eastern gave rise to a new and separate cause of action, this new and separate cause of action could have been added to the then-pending *Covert II* claim. Petitioner's failure to assert this perceived claim in *Covert II* resulted in it being barred in any subsequent litigation, including this one, again on the basis of *res judicata*. The district judge agreed, and cited this as an alternative basis for granting OMC's motion for summary judgment. (See page 7a of Petition for a Writ of Certiorari).

The Court of Appeals decision does not conflict with *Lawlor v. National Screen Corp.* To the contrary, *Lawlor* supports the holdings of the District Court and the Court of Appeals.

2. There is no exception to the bar of *res judicata* based upon state policy.

Petitioner's second argument is that this case merits an exception to the bar of *res judicata*, claiming justification for this exception "when a state statute embodies a strong legislative policy of the state". Petitioner con-

tends this is an important question of federal law which has not been resolved by this Court, and should now be resolved.

The case of *Federated Department Stores, Inc. v. Moitie*, _____ U.S. _____, 101 Sp.Ct. 2424, 69 L.Ed.2d 103 (1981), holds to the contrary, and is dispositive of this issue:

> "Simple Justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principles of *res judicata*." [citations omitted]. 101 Sp.Ct. at 2429, 69 L.Ed.2d at 110.

Petitioner attempts to circumvent the *Covert I* Final Judgment (see footnote on pages 6 and 7 of Petition for a Writ of Certiorari) by arguing the termination provision is "void", since it is contrary to the New Jersey Franchise Practices Act. While it certainly is not clear that such a provision would be disallowed under the New Jersey Act, Petitioner has pointed to no authority that permits a state statute—regardless of any "strong legislative policy"—to override and nullify a valid final judgment entered by a federal court in an action instituted under a federal statute. Authority to the contrary is the supremacy clause of the United States Constitution, U.S. CONST. art. VI, cl. 2.

There is no exception to the doctrine of *res judicata* based upon "a strong legislative policy of a state", and a contrary view is not an important question of federal law. The issue has long since been laid to rest, most recently in *Federated Department Stores, supra.*

3. There is no exception to the bar of *res judicata* based upon an erroneous belief of the Claimant.

Petitioner's third argument is that an exception to the principles of *res judicata* should be made in this case, since Montag "believed" he was preserving the right to file another lawsuit based upon the state statute.

Petitioner points to the portion of the *Covert I* Final Judgment that dismisses with prejudice "each and every claim asserted in the Complaint" as justification for his belief that he could file a subsequent action based upon the New Jersey statute, since only federal antitrust claims were asserted in the *Covert I* complaint. What Petitioner overlooks, however, is that a claim under the federal antitrust laws and a claim under the New Jersey statute would be for the same cause of action, since both claims arose from the same course of conduct. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores v. Moitie*, _____ U.S. _____, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103, 108 (1981).

Petitioner fails to take notice of that portion of the *Covert I* Final Judgment that specifies that the OMC-Eastern distributorship agreement shall terminate on September 30, 1978, after which time OMC "shall have no further obligation to deal with" Eastern. (Paragraph III of Final Judgment, Appendix 1 herein).

Any suggestion that Petitioner's state action claim was preserved by a "contractual stipulation" embodied in the *Covert I* Final Judgment is totally unsupported, and the Final Judgment itself provides to the contrary when it explicitly recognizes and orders that the termination take place on September 30, 1978.

As to *Covert II*, the record in that case discloses only that the district court dismissed the case based upon the *res judicata* effect of *Covert I*, and the appeal was dismissed with prejudice by the Seventh Circuit. On file in this case are two Affidavits by Eastern's *Covert II* attorney. The first recounts the settlement activities that took place in *Covert II*, including the fact that Eastern did not participate in the settlement. The second Affidavit (Appendix 4 herein), goes on to add that even though Eastern chose not to enter the settlement in *Covert II*, Eastern nevertheless authorized its attorney to dismiss the appeal: "I dismissed Eastern's appeal with the full authority and approval of William S. Montag, Eastern's president." Affidavit of William M. Austin, paragraph 4, Appendix 4.

The record discloses no more. If, as Petitioner contends, the dismissal of the *Covert II* appeal was without authority or in some other regard defective, Petitioner's remedy is not a collateral attack on the judgment in the District Court in New Jersey, but a direct attack at the Court of Appeals for the Seventh Circuit or the District Court in Indiana. This was the holding of District Judge Meanor:

> Furthermore, in *Covert II* there is a dismissal with prejudice still on the docket. Now, that may have been without authority of the attorney, it may have been through error, inadvertance, I know not.
>
> I am quite clear if that dismissal is to be corrected that correction has to take place in the U.S. District Court in Indiana and not in the U.S. District Court in New Jersey.

Page 7a, Appendix B to Petition for a Writ of Certiorari.

This Court has recently reaffirmed its prior holding on this point, when Mr. Justice Rehnquist, speaking for the Court in *Federated Department Stores, Inc. v. Moitie*, _____ U.S. _____, 101 Sp.Ct. 2424, 69 L.Ed.2d 103 (1981), stated:

> As this Court explained in *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 325, 47 S.Ct. 600, 604, 71 L.Ed. 576 (1927) an "erroneous conclusion" reached by the court in first suit does not deprive the defendants in the second action "of their right to rely upon the plea of res judicata .... A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause of action."

101 Sp.Ct. at 2427-28, 69 L.Ed.2d at 109.

In the case at hand, the record is very clear and unambiguous. While Petitioner may contend that he "believed" he had preserved a right to bring a state action claim against OMC for the same cause of action pursued in the two federal antitrust actions, this "belief" does not create an exception to the law of *res judicata*. "We have stressed that the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace', which should be cordially regarded and enforced by the court" *Federated Department Stores, Inc. v. Moitie*, _____ U.S. _____, 101 Sp.Ct. 2424, 2429, 69 L.Ed.2d 103, 111 (1981), quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).

There is no exception to the bar of *res judicata*, even if Petitioner believed he had preserved a state law claim when he settled *Covert I* or when he dismissed his appeal

in *Covert II*. There is no question of federal law raised by Petitioner's argument, since the federal law is very clear that no such exception exists. *Federated Department Stores, Inc. v. Moitie*, _____ U.S. _____, 101 Sp.Ct. 2424, 69 L.Ed. 2d 103 (1981).

Conclusion

Petitioner presents no conflict between the decision of the United States Court of Appeals for the Third Circuit and this Court or any other court of appeals, nor does Petitioner raise any important question of federal law which has not been, but should be, settled by this Court. Respondent therefore requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Attorney for Respondent
Outboard Marine Corporation

Appendix

APPENDIX 1

Final Judgment of the United States District Court for the Northern District of Indiana.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA FORT WAYNE DIVISION

COVERT MARINE, INC., CRANDALL-HICKS COMPANY, INC., EASTERN OUTBOARD PARTS CORPORATION, GRIFFIN'S OUTBOARD MARINE, INC., LOE MARINE SUPPLY CO., INC., and PYRON & GARROW PARTS DEPOT, INC.,

Plaintiffs,

v.

OUTBOARD MARINE CORPORATION and OMC PARTS DEPOT-FORT WAYNE, INC.,

Defendants.

Civil Action No. 71-F-104.

FILED
May 23 1972
At_____M
Francis T. Grandys, Clerk

FINAL JUDGMENT

Plaintiffs having filed their Complaint herein on September 21, 1971, and defendants having appeared by their counsel, and the parties having consented to the entry of this Final Judgment herein, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or admission by any party with respect to any such issue;

NOW, THEREFORE, without any testimony having been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

This Court has jurisdiction of the subject matter of this action and the parties hereto.

II.

Outboard Marine Corporation for purposes of this Final Judgment shall include any subsidiary, affiliate or division of Outboard Marine Corporation and any successor to Outboard Marine Corporation.

III.

The term of the OMC Parts and Accessories Distributor Agreement between each plaintiff and defendant Outboard Marine Corporation, a copy of which is attached hereto, shall be extended to September 30, 1978, and any provision therein for earlier expiration or termination without cause is hereby cancelled, and each such Agreement shall thereupon terminate and be of no further force and effect and defendant Outboard Marine Corporation shall have no further obligation to deal with any plaintiff. During the term of each such Agreement the territory specified therein shall not be diminished.

IV.

Upon termination of each Agreement, Outboard Marine Corporation shall repurchase and each plaintiff shall sell to Outboard Marine Corporation, f.o.b. each

plaintiff's place of business, such new saleable OMC products, parts and accessories as are covered by such Agreement as said plaintiff may have on hand at the price for which said plaintiff was billed therefor without deduction for reconditioning and handling expense.

V.

Until termination of the Agreement between each plaintiff and defendant Outboard Marine Corporation as provided in Article III hereof, defendant Outboard Marine Corporation shall continue to sell to said plaintiff, in good faith and on nondiscriminatory terms and conditions pursuant to the terms of said Agreement and the past course of dealings between the parties, service parts and accessories for all of the products listed in said Agreement and for other products which replace such products.

VI.

Until termination of the Agreement between each plaintiff and defendant Outboard Marine Corporation as provided in Article III hereof, said plaintiff shall continue to sell and distribute the parts and accessories offered for sale to it by defendant Outboard Marine Corporation effectively and in good faith pursuant to the terms of said Agreement and the past course of dealings between the parties.

VII.

Defendant Outboard Marine Corporation shall not, prior to the termination of its Agreement with a plaintiff, as provided in Article III hereof or as otherwise agreed between defendant Outboard Marine Corporation and

said plaintiff, sell to retailers any service parts or accessories for any of the products listed in said Agreement from any place of business of defendant Outboard Marine Corporation located within the geographic area specified in said agreement.

VIII.

Except as expressly provided herein, each and every claim asserted in the Complaint is hereby dismissed with prejudice.

IX.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties hereto to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or carrying out of this Final Judgment.

/s/ JESSE E. ESCHBACH
United States District Court
May 23, 1972

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

RICHARD E. TIMMONS, CLERK
By CONNIE A. ROSE
Deputy Clerk
Date Dec 3, 1980

APPENDIX 2

Memorandum of Decision and Order of the United States District Court for the Northern District of Indiana.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

COVERT MARINE, INC., *ET AL.*,

Plaintiffs,

v.

OUTBOARD MARINE CORP.,

Defendant.

Civil No. F 78-76.

FILED
Jul 30 1979
At_____M
Richard E. Timmons, Clerk
U.S. District Court
Northern District of Indiana

MEMORANDUM OF DECISION AND ORDER

This cause is before the court on defendant's motion for dismissal as to all plaintiffs and motion for dismissal as to retailer plaintiffs, both filed July 31, 1978. For the reasons which follow, defendant's J uly 31, 1978 motion for dismissal as to all plaintiffs will be granted in part and denied in part; defendant's July 31, 1978 motion for dismissal as to retailer plaintiffs (retail dealers, herein) will be denied.

A motion to dismiss is the usual and proper method of testing the sufficiency of a complaint. For purposes of the motion, allegations are taken as admitted. *Mathers Fund, Inc. v. Colwell Co.*, 564 F.2d 780 (7th Cir. 1977); *Parr v. Great Lakes Express Co.*, 484 F.2d 767 (7th Cir. 1973). A complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972); *Mathers Fund, Inc., supra.*

Plaintiffs in this case must be considered as two separate groups. Plaintiff-distributors are six independent wholesale distributors of marine parts and accessories. Plaintiff-dealers are 21 purchasers for retail resale of said parts and accessories. "Parts" refers to repair and replacement parts for boat motors and engines. "Accessories" refers to products such as boat windshields, anchors, life jackets and water skis.

Defendant Outboard Marine Corporation (OMC) is a multidivisional, multinational corporation with its primary interest in marine propulsion. OMC is a manufacturer of Johnson and Evinrude outboard and OMC sterndrive motors, replacement parts for those motors, and a line of accessories (OMC accessories). OMC also markets accessories obtained from other manufacturers, some of which carry the OMC label (OMC accessories) and some of which carry the outside manufacturer's label (non-OMC accessories).

Approximately eight years ago, the six plaintiff-distributors commenced an action in this court against defendant OMC and a subsidiary (Civil Action No. 71-F-104, hereinafter, Covert I). The plaintiff-distributors then

complained that their proposed replacement by OMC's direct distribution to retailers of replacement parts and accessories for OMC's outboard motors and other products violated Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§1 and 2).

For some years, plaintiff-distributors had agreements with OMC that OMC should supply to the distributors and the distributors should sell at wholesale prices to retail dealers, OMC replacement parts and accessories. Such agreements were continued on a year to year basis until May 23, 1972, when just before trial and after extensive discovery and briefs with respect to a hearing on a motion for a preliminary injunction, the six plaintiff-distributors and OMC agreed to a compromise settlement and consented to the entry of a Final Judgment in Covert I. Under that Consent Judgment (drafted by the parties), the term of the OMC Parts and Accessories Distributor Agreement between each plaintiff-distributor and OMC was to be extended until September 30, 1978, when each such agreement was set to terminate with OMC having no further obligation to deal with any plaintiff-distributor.

Plaintiffs again allege in their complaint in this lawsuit (Covert II) that OMC's discontinuance of its relationship with plaintiff-distributors is in violation of the federal antitrust laws, in particular Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. Plaintiffs seek damages for this alleged violation of the antitrust laws (15 U.S.C. §15) and seek injunctive relief (15 U.S.C. §26).

Appendix 2—Memorandum of Decision and Order of the United States District Court for the Northern District of Indiana.

Plaintiff-distributors

In 1971, Covert Marine, Inc., Crandall-Hicks Company, Inc., Eastern Outboard Parts Corporation, Griffin's Outboard Marine, Inc., Loe Marine Supply Company, Inc., and Pyron & Garrow Parts Depot, Inc., commenced an action against defendant OMC and a subsidiary in this court (Civil Action No. 71-F-104). In that action, plaintiff-distributors complained that their proposed replacement by OMC's direct distribution to retailers of parts for the repair and maintenance of OMC's outboard motors violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2).

Plaintiff-distributors in Covert I also complained that OMC, in violation of §2 of the Sherman Act, "has attempted and is attempting to monopolize and has monopolized" the distribution of OMC parts and the distribution of OMC and non-OMC accessories. Covert I complaint, ¶42.

After extensive discovery and briefs with respect to a hearing on a preliminary injunction motion, and after extensive negotiations under the guidance of able counsel on both sides, the plaintiff-distributors and OMC drafted and agreed to the entry of a Final Judgment on May 23, 1972.

That Covert I Final Judgment provides in part:

> The term of the OMC Parts and Accessories Distributor Agreement between each plaintiff and defendant Outboard Marine Corporation . . . shall be extended to September 30, 1978, and any provision therein for earlier expiration or termination without cause is hereby cancelled, and each such Agreement shall thereupon terminate and be of no further force

> and effect and defendant Outboard Marine Corporation shall have no further obligation to deal with any plaintiff. (Article III, Final Judgment);
>
> Upon termination of each Agreement, Outboard Marine Corporation shall repurchase and each plaintiff shall sell to Outboard Marine Corporation ... such new saleable OMC products, parts and accessories as are covered by such Agreement as said plaintiff may have on hand ... (Article IV, Final Judgment);
>
> Except as expressly provided herein, each and every claim asserted in the Complaint is hereby dismissed with prejudice. (Article VIII, Final Judgment).

On February 23, 1977, the six plaintiff-distributors, this time joined by plaintiff-dealers, commenced the instant action against OMC in the Western District of Missouri. Again, the essence of the charge is that the termination by OMC of business relationships with the plaintiff-distributors on September 30, 1978 violates Sections 1 and 2 of the Sherman Act.

While plaintiffs have attempted to differentiate this claim from Covert I through the addition of plaintiff-dealers and through increased emphasis on accessories, the cause of action presented in Covert II is virtually the same cause of action as was asserted in Covert I.[1] In

[1] Plaintiffs' reply to affirmative defenses of estoppel and *res judicata* filed November 21, 1977, attempts to distinguish Covert II from Covert I by saying that Covert I sought a continuation of the OMC Parts and Accessories Distribution Agreements between plaintiff-distributors and defendant while in Covert II, the relief sought is the prevention of the elimination of the independent distribution system of replacement parts for Johnson and Evinrude motors.

(Footnote continued on following page)

fact, many parts of the Covert II complaint seem to have been taken verbatim from the Covert I complaint or to have been only slightly paraphrased, even though plaintiffs do not now have the same counsel as they had in Covert I. Compare, for example, ¶15 of the Covert I complaint with the first paragraph on page 12 of the Covert II complaint; compare ¶¶20 through 25 of the Covert I complaint with pages 12 and 13 of the Covert II complaint. The offense charged in the Covert II complaint is, in essence, the same as that charged in Covert I; compare pages 26 through 28 of the Covert II complaint with ¶¶33 through 47 of the Covert I complaint.

In addition, ¶E of the Covert II complaint includes the terms of Articles II through VII of the Final Judgment in Covert I as part of the offense charged in Covert II; these were the very terms the plaintiff-distributors themselves agreed to in settlement of the Covert I lawsuit. Thus, Covert II is an attack on the Covert I Final Judgment. Further, the prayer in Covert II requesting an injunction which would force OMC to con-

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(Footnote continued from preceding page)

The only potentially significant difference between Covert I and Covert II and the only difference noted by plaintiffs in their reply, is the above-mentioned difference in the prayer for relief. But when it is noted that the plaintiffs in Covert I comprised six of the seven independent distributors east of the Rockies, it is clear that this is a distinction without a difference. Further, in the context of the preliminary injunction previously before the court, the prayer for relief in plaintiffs' motion for preliminary injunction specifically requests that defendant be enjoined to continue to sell parts and accessories to *plaintiff wholesalers*, to continue to deal with *plaintiff wholesalers*, not to refuse to sell to *plaintiff wholesalers* and not to terminate *plaintiff wholesalers* as distributors of OMC products. Thus, even this strained distinction, the only one that plaintiffs advance in their reply, is non-existent.

tinue dealing with the plaintiff-distributors and preventing OMC from repurchasing the OMC products, seeks to nullify Articles III and IV of the Judgment.

Notwithstanding denials now, all parties at the time of the Final Judgment in Covert I anticipated the termination of the distribution contracts as of September 30, 1978. See ¶E, page 28, Covert II complaint. Since the entry of that Final Judgment, however, few of the plaintiff-distributors have taken significant steps to find substitute lines of merchandise or to otherwise prepare for the termination of the distribution contracts. The only logical inference from such inaction is that plaintiff-distributors did not intend, even on the day the terms of the Final Judgment were agreed upon and the Judgment approved, to be bound by its terms. Even though plaintiff-distributors accepted and enjoyed the benefits of the agreement as fully performed by defendant, plaintiff-distributors are now unwilling to perform their part of the agreement.

A consent judgment, whether at law or in equity, has *res judicata* effect.[2] *See* Moore, Vol. 1B, ¶0.409, pp. 1026-27, 2d ed. 1974. As a general rule, consent decrees are accorded *res judicata* effect. *United States v. Southern Ute Tribe or Band of Indians,* 402 U.S. 159, 91 S.Ct. 1336 (1971); *Wallace Clark & Co. v. Acheson Indus., Inc.,* 532 F.2d 846 (2d Cir. 1976), *cert. denied,* 425 U.S. 976. In *Brunswick Corporation v. Chrysler Corporation,* 408 F.2d

[2] See discussion of Lawlor v. National Screen Service Corp., 349 U.S. 322, 75 S.Ct. 865 (1955) in the Memorandum of Decision and Order entered in this case on September 25, 1978.

335 (7th Cir. 1969), the court, quoting from its opinion in *O'Cedar Corporation v. F. W. Woolworth Corp.*, 66 F.2d 363, 366 (7th Cir. 1933), said:

> * * * [A] decree of a court having jurisdiction of the subject matter rendered by consent of the parties, though without any ascertainment by the court of the truth of the facts averred, is as binding and conclusive between the parties and their privies as if the suit had been an adversary one.

408 F.2d at 337. In addition, a stipulation of dismissal with prejudice or dismissal with prejudice at any stage of the proceedings, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action. *Astron Industrial Assoc., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968).

Thus, because the same identical distributor-plaintiffs are involved in Covert II as were involved in Covert I, and because Covert II arises out of the same cause of action as did Covert I which embraced the manufacture, sale and distribution of both OMC parts and accessories (see Covert I complaint, ¶¶33 through 47), the present lawsuit is foreclosed as to plaintiff-distributors by the principle of *res judicata*.[3] As the *Wallace Clark* court

[3] In the April 12, 1979 unpublished order affirming this court's September 25, 1978 denial of plaintiffs' motion for a preliminary injunction, the United States Court of Appeals for the Seventh Circuit stated the following:

> The district court concluded, after an evidentiary hearing, that neither the plaintiff-retailers nor the plaintiff-wholesalers had made the necessary showings to warrant the grant of a preliminary injunction, nor class certification. Because of the liklihood that the plaintiff-wholesalers will be barred by *res judicata*, and because of the failure of plaintiff-retailers to demonstrate irreparable harm (and the very serious question of their liklihood of success in any event), we agree.

said: "Judicial decrees disposing of issues in active litigation cannot be treated as idle ceremonies without denigrating the judicial process." 532 F.2d at 849.

Accordingly, defendant's July 31, 1978 motion for dismissal as to all plaintiffs will be granted as it relates to plaintiff-distributors.

Plaintiff-dealers

Plaintiffs allege that defendant has engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area in violation of Sections 1 and 2 of the Sherman Act. In addition, they allege that such combination in restraint of trade will be used by OMC to gain a competitive advantage in the manufacture, distribution and sale of marine accessories in the United States east of the Rockies. Plaintiffs have alleged that upon the discontinuance of the business relationship between defendant and plaintiff-distributors, plaintiff-dealers will no longer have a free marketplace in which to function but will be compelled to depend entirely upon the defendant for their source of supply at whatever price and terms the defendant sets and will have to accept any level of service provided by defendant. In essence, plaintiff-dealers contend that there will be higher prices and lower levels of service. Based on these allegations, plaintiffs seek treble damages under 15 U.S.C. §15 and seek to enjoin the alleged violations of the antitrust laws. 15 U.S.C. §26.

The "fact of injury" is by statute a prerequisite to the bringing of an action for damages; it is by statute an element of plaintiffs' standing to sue. A plaintiff not thus

injured may nonetheless bring suit under 15 U.S.C. §26 to enjoin threatened violations of the antitrust laws, but injury in fact to plaintiff personally must be shown in order that a plaintiff may avail itself of the damage action created under 15 U.S.C. §15. *Beegle v. Thompson*, [1940-1943 Trade Cases ¶56,291], 138 F.2d 875, 881 (7th Cir. 1943), *cert. denied*, 322 U.S. 743 (1944); *Dafforn v. Rousseau Associates, Inc.*, [1977] Trade Reg. Rep. (CCH ¶61,219 (N.D. Ind. filed July 27, 1976)). For the private damage action under 15 U.S.C. §15, the gravamen of the complaint is "the damage which the suitor has suffered." *Burnham Chemical Co. v. Borax Consolidated Ltd.* [1948-1949 Trade Cases ¶62,322], 170 F.2d 569, 571 (9th Cir. 1948), *cert. denied*, 336 U.S. 924 (1949). Actual injury is "the crux of any plaintiff's cause of action." *Hettinger v. Glass Specialty Co.* [1973-1 Trade Cases ¶74,487], 59 F.R.D. 286, 293-94 (N.D. Ind. 1973).

A plaintiff seeking injunctive relief under 15 U.S.C. §26 must demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 133, 89 S.Ct. 1562 (1969). Under §26, as under §15, the threatened damage or loss must be of a type personal to the plaintiff. *United States v. Borden Co.*, 347 U.S. 514, 74 S.Ct. 703 (1954).

While the evidence heard at the hearing held August 17, 20 and 21, 1978 on plaintiffs' May 31, 1978 motion for a preliminary injunction, indicates that it is highly unlikely that plaintiff-dealers will be able to meet the above standards and prevail in their litigation of their

claims,[4] it cannot be said at this time to a certainty that plaintiff-dealers are entitled to no relief under any set of facts which could be proved in support of their claims. *Haines v. Kerner, supra; Mathers Fund, Inc., supra.*

Defendants assert two major grounds for dismissal of the complaint as it relates to plaintiff-dealers.

In the July 31, 1978 motion for dismissal as to retailer plaintiffs, defendant contends that plaintiff-dealers are indirect purchasers from defendant and that, therefore, their claims are barred under *Illinois Brick Co. v. State of Illinois,* 431 U.S. 720, 97 S.Ct. 2061 (1977). In the July 31, 1978 motion for dismissal as to all plaintiffs, citing Rule 65(d) of the Federal Rules of Civil Procedure, defendant contends that having knowingly joined the six plaintiff-distributors in attacking and attempting to nullify and void the Covert I final judgment by institution of Covert II, the 21 plaintiff-dealers are precluded from proceeding in Covert II.

All of the 21 plaintiff-dealers are described in plaintiffs' complaint as being "engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area." Thus, by plaintiffs' own description, plaintiff-dealers, at the time the complaint was filed, were indirect purchasers from defendant within the meaning of *Illinois*

[4] See discussion of the evidence in the Memorandum of Decision and Order entered in this case on September 25, 1978.

Brick.[6] However, the mere fact that plaintiff-dealers were at that time indirect purchasers from defendant may not end the inquiry regarding defendant's motion to dismiss.

In addressing the question in *Illinois Brick* whether the overcharged direct purchaser should be deemed for purposes of §4 of the Clayton Act to have suffered the full injury from the overcharge, and in the context of a suit in which the plaintiff, an indirect purchaser, sought to show its injury by establishing the "pass-on" of previously applied overcharges by the direct purchaser, the Supreme Court held that

> the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under §4 [of the Clayton Act, 15 U.S.C. §15] . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed part of it.

97 S.Ct. at 2075. The Court recognized that indirect purchasers may be actually injured by such antitrust violations, but declined, in the context of *Illinois Brick*, to ex-

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[6] Plaintiffs have not sought to amend their complaint to reflect any changes in this status which may have resulted from the defendant's termination of its business relationship with plaintiff-distributors.

Only OMC itself is named as the defendant in this lawsuit. None of the new distribution outlets has been named as a defendant. However, plaintiffs have labeled the following corporations "co-conspirators and participants with defendant in the illegal acts and transactions" set out in the complaint: OMC Distributors, Inc., Fort Wayne; OMC Distributors, Inc., Waukegan; OMC Distributors, Inc., Minneapolis; Outboard Marine International, Inc., Miami; and OMC Distributors, Inc., Miami, and others "whose identity is presently unknown to plaintiffs." Neither the precise legal status of these corporations nor the precise relationship between OMC or plaintiff-dealers and the above corporations has been made clear.

tend the treble damages remedy and "pass-on" theory of recovery to such indirect purchasers because of potential problems of "massive evidence and complicated theories," apportionment of damages, and multiple lawsuits initiated by those at the various levels of supply and resale.

Plaintiffs' complaint here is rather generally framed and seems to be framed chiefly to allege injury to plaintiff-distributors rather than to plaintiff-dealers. Thus, it is not possible at this time to determine whether plaintiff-dealers seek to utilize only a "pass-on" theory of overcharge, such that their action would be precluded by *Illinois Brick*. *Cf. Beckers v. International Snowmobile Industry Assoc.*, 581 F.2d 1308 (8th Cir. 1978), *In re Folding Carton Antitrust Litigation*, [1977-2 Trade Cases ¶61,596] (N.D. Ill. 1977). Nor have the issues been adequately briefed as to whether the *Illinois Brick* decision is binding in suits brought under theories under §4 of the Clayton Act other than "pass-on" theories, and whether that decision is binding in suits in which injunctive relief is sought under 15 U.S.C. §26.

Thus, at this time, defendant's July 31, 1978 motion for dismissal as to retailer plaintiffs will be denied.[6]

Defendants' motion to dismiss all plaintiffs, as it relates to plaintiff-dealers is based upon Rule 65(d) of the Federal Rules of Civil Procedure. Rule 65(d) provides the following:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in

[6] This is not to say that a more fully briefed motion to dismiss or a motion for some other form of summary disposition might not be appropriate in this case. See *e.g.*, Lupia v. Steel D'Oro Biscuit Co., Inc., 586 F.2d 1163 (7th Cir. 1978).

> reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Rule 65(d), however seems to be inapplicable to the case at hand. Cases cited by defendant in support of its contentions relating to Rule 65(d) can be easily distinguished, as set out in plaintiffs' September 7, 1978 "Suggestions in Opposition to Defendant's Motion for Dismissal—as to all Plaintiffs . . . regarding the cases of *Chanel Industries, Inc. v. Pierre Marche, Inc.*, 199 F.Supp. 748 (E.D. Mo. 1961) and *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S.Ct. 414 (1973). Likewise, *Crane Boom Life Guard Co. v. Saf-T-Boom Corp.*, 362 F.2d 317 (8th Cir. 1966) can be distinguished on its facts.

In *Crane Boom*, a consent decree was entered into in 1962; the 1962 consent decree bound Crane Boom Guard Co., Inc., and personally bound H. P. Merritt, Jr., S. A. Coffey, and Arthur J. Thomas. After the 1962 consent decree, S. A. Coffey obtained a patent for "Crane Boom Life Guard," and Coffey and Associates organized a corporation known as Crane Boom Life Guard Company, Inc. Coffey assigned his patent to that corporation. Under such circumstances, and in view of Coffey's relationship to both Crane Boom Guard Co., and Crane Boom Life Guard Co., the trial court concluded that the original injunctive decree embodied in the 1962 consent decree included Crane Boom Life Guard Co., Inc. This court is aware of no such relationship in this case, and at

this time is not aware of facts sufficient to provide a basis for a finding of privity between plaintiff-distributors and plaintiff-dealers within the meaning of Rule 65(d). 7-Pt. 2 Moore's Federal Practice ¶65.13.

Thus, the defendant's motion to dismiss all plaintiffs, insofar as it relates to plaintiff-dealers and is based upon Rule 65(d) of the Federal Rules of Civil Procedure, will be denied.

ORDER

Accordingly, defendant's July 31, 1978 motion for dismissal of all plaintiffs is granted as it relates to plaintiff-distributors; namely, Covert Marine, Inc.; Crandall-Hicks Company, Inc.; Eastern Outboard Parts Corporation; Griffin's Outboard Marine, Inc.; Loe Marine Supply Co., Inc.; and Pyron & Garrow Parts Depot, Inc.; and is denied as it relates to plaintiff-dealers; namely, B & T Boat Co., Inc.; Lowe Industries, Inc.; Brownie's Boat Center, Inc.; Corr's Mariner's Cove, Inc.; Heritage Marine, Inc.; Island Marine Base, Inc.; Kydds Marine Center, Inc.; Long Beach Sports Marine, Inc.; Lyon Bros. & Sons, Inc.; McConnell, John d/b/a Mac's Service Center; The Mooring; Moriches Marine Corp. d/b/a Moriches Boat & Motor; Outboard Service of Al Grover's, Inc.; McCormack, J. M. d/b/a Royal Craft Boats; Stovall Tire and Marine, Inc.; S. V. Geraghty Marine; Arrow Marine, Inc.; H. P. Brown, Inc.; Ervin's Inc.; Kingsman II, Inc. d/b/a Midwest Marine, and Manhasset Bay Outboard, Inc.

Defendant's July 31, 1978 motion for dismissal as to plaintiff-dealers; namely, B & T Boat Co., Inc.; Lowe Industries, Inc.; Brownie's Boat Center, Inc.; Corr's

Mariner's Cove, Inc.; Heritage Marine, Inc.; Island Marine Base, Inc.; Kydds Marine Center, Inc.; Long Beach Sports Marine, Inc.; Lyon Bros. & Sons, Inc.; McConnell, John d/b/a Mac's Service Center; The Mooring; Moriches Marine Corp. d/b/a Moriches Boat & Motor; Outboard Service of Al Grover's, Inc.; McCormack, J. M. d/b/a Royal Craft Boats; Stovall Tire and Marine, Inc.; S. V. Geraghty Marine; Arrow Marine, Inc.; H. P. Brown, Inc.; Ervin's Inc.; Kingsman II, Inc. d/b/a Midwest Marine; and Manhasset Bay Outboard, Inc.; is denied.

Entered this 30th day of July, 1979.

/s/ JESSE E. ESCHBACH
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

RICHARD E. TIMMONS, CLERK
By CONNIE A. ROSE
Deputy Clerk
Date Dec. 3, 1980

APPENDIX 3

Judgment of Dismissal of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

14

CORRECTED: July 11, 1980
July 1, 1980

Certified Copy
By the Court:

Corrected
A True Copy:
Teste:

LARTINA McCOY, Deputy
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

COVERT MARINE, INC., *et al.*,
Plaintiffs-Appellants,

vs.

OUTBOARD MARINE CORPORATION,
Defendant-Appellee.

No. 80-1351.

Appeal from the United States District Court
for the Northern District of Indiana,
Fort Wayne Division.
No. F 78-C-76.
Judge Jesse E. Eschbach.

This matter comes before the court for its consideration upon the following documents:

Appendix 3—Judgment of Dismissal of the United States Court of Appeals for the Seventh Circuit.

1. The "STIPULATION FOR VOLUNTARY DISMISSAL OF APPEAL" filed herein on June 16, 1980, by counsel for the plaintiffs-appellants.

2. The "RESPONSE OF DEFENDANT-APPELLEE TO STIPULATION FOR VOLUNTARY DISMISSAL OF APPEAL" filed herein on June 24, 1980.

On consideration thereof,

IT IS ORDERED that upon the representation of counsel for the defendant-appellee that he has no objection to the plaintiffs-appellants' motion for dismissal, this appeal from a decision of the United States District Court for the Northern District of Indiana, Fort Wayne Division, is hereby DISMISSED *with prejudice*, costs to be borne by the parties who incurred them, pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure.

FILED
Jul 30 1980
At_____M
Richard E. Timmons, Clerk
U.S. District Court
Northern District of Indiana

APPENDIX 4

Affidavit of William M. Austin.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

A237

WILLIAM S. MONTAG,

Plaintiff,

vs.

OUTBOARD MARINE CORPORATION, *et al.*,

Defendants.

Civil Action No. 80-3344.
Honorable J. Curtis Meanor, *U.S.D.J.*

AFFIDAVIT OF WILLIAM M. AUSTIN, ESQ.

STATE OF MISSOURI }
COUNTY OF JACKSON } ss.

1. I am an attorney at law of the State of Missouri and admitted to practice before the United States District Court for the Western District of Missouri, with offices located at Twelfth and Baltimore, 2930 City Center Square, Kansas City, Missouri 64196.

2. This Affidavit is made as a supplement to my Affidavit filed with the Court on or about May 1, 1981, in support of Plaintiff's Brief In Opposition To Defendant's Motion For Summary Judgment.

3. In paragraph 9 of my prior Affidavit, I stated "I was informed by Mr. McCartle, counsel for defendant, that OMC would *not* accept Eastern's partial release . . ." After being so informed by Mr. McArdle, I proceeded to

file with the Seventh Circuit a "Stipulation For Voluntary Dismissal of Appeal", which dismissed the Appeal, with prejudice, of all six plaintiffs, including Eastern.

4. I dismissed Eastern's appeal with the full authority and approval of William S. Montag, Eastern's president.

WILLIAM M. AUSTIN

Subscribed and sworn to before me this 7th day of May, 1981.

SARAH E. BONHAM
Notary Public
State of Missouri
Commissioned in Clay County
My Commission Expires September 19, 1984